

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1415

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

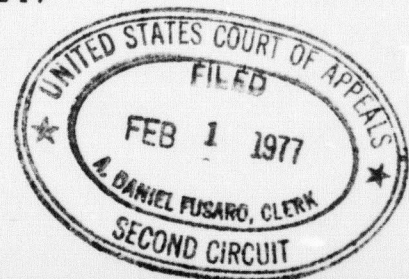
-against-

LUIS A. MENA,

Appellant.
-----X

DEFENDANT-APPELLANT'S REPLY BRIEF

LOUIS A. TIRELLI
Attorney for Appellant
Office and Post Office Address
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS A. MENA,

Appellant.

-----X

DEFENDANT-APPELLANT'S REPLY BRIEF

POINT ONE

DEFENDANT'S MOTION FOR A JUDGMENT
OF ACQUITTAL SHOULD HAVE BEEN
GRANTED BY THE TRIAL JUDGE.

The Rule 29 motion made at the conclusion of the Government's rebuttal case, which indeed was a renewal of the Rule 29 motion made at the conclusion of the Government's case-in-chief should have been granted since there was ample testimony sufficiently indicating that there was no possible way that the Appellant could have been parked under the Brooklyn Queens Expressway under date of the alleged sale.

As pointed out in the Appellant's brief-in-chief, the People fail to show that the Pontiac was at a specific place on the night of December 16, 1976. The fact that agents who are professionals and whose job it is to remember specifically where an item

was placed when they are on surveillance were unable to specifically locate the Pontiac which was supposedly driven by the Appellant. Thus, this is not assessing the credibility of a witness, nor weighing evidence, nor drawing inferences of fact from the evidence, which certainly are jury functions; but this is determining as a matter of law whether the agents were able to identify the presence of the Appellant on the night of the sale. This, they failed to do.

Furthermore, there was additional data presented in this case, since Mr. Lamb, the bank manager, testified (T126, 127) that the Appellant spoke very little English and that the Appellant "usually brought someone in that spoke English and could interpret for him". This contrasted totally with the agent's testimony that the Appellant spoke English.

POINT II

IT WAS IMPROPER FOR THE COURT TO ADMIT
INTO EVIDENCE PHOTOGRAPHS OF THE AREA
WHERE THE CRIME TOOK PLACE WHICH DID
NOT FAIRLY AND ACCURATELY DEPICT THE
AREA.

The Government contends that the fence in no way obstructed the agent's view of the offense to which they testified. Yet, on page 8 of the Government's Brief for the Appellee, the Government admits that Agent Ridler testified that the Mena vehicle was located to the right of the Government vehicle (T180) while Agents Papantoniou and Sears testified that the Mena vehicle was to the left of the Government vehicle. This alone shows that the fence could have been located in such a manner as to block the proper view of any surveillance agents. Furthermore, *United States v. Bucon Construction Company*, which was cited by the Government at page 425 merely holds for the proposition

that when a long time has elapsed between the taking of photographs and the site photographed that the photographs are admissible so long as there is "no material change" in the site. Specifically, in United States v. Bucon Construction Company, a length of time intervened between the completion of the building and the taking of the photographs. The Court held that the photographs were admissible because

"no material change in the parts of the exterior and the interior of the building depicted in the photographs had taken place since its completion."

In the case at point, there is no question but that there is a material change, both in the fence and the cars that were parked.

POINT III

DEFENDANT HAS NO OBLIGATION TO DO ANYTHING
IN HIS OWN DEFENSE IN A CRIMINAL TRIAL AND
THE GOVERNMENT'S STATEMENTS TO THE CONTRARY
ARE PREJUDICIAL.

The Government's position that the Prosecution's Summation regarding defense's failure to produce "Carlo" constituted a legitimate comment upon the case if followed would change the burden upon the defendant so that it would be his obligation to investigate and show by competent investigation similar to a "Perry Mason Show" why the defendant did not commit the crime and that the Government is incorrect in their assertions that he did commit a crime. In order to protect the defendant so that he need not do anything to prove his innocence and to continue to keep the obligation on the Government to prove the defendant is guilty beyond a reasonable doubt, this Court must find that such a prejudicial statement is sufficiently prejudicial to cause

a reversal.

POINT IV

THE GOVERNMENT'S ATTEMPTS TO SHOW THAT
THE APPELLANT COULD SPEAK ENGLISH AT
THE TIME THE CRIME WAS COMMITTED WAS
BAD FAITH AND PREJUDICIAL.

The Government contends that Mr. Lamb corroborated Agent Papantoniou's statement that Mena spoke broken English. Contrary to this, Mr. Lamb's testimony only showed that Mr. Mena could say "Good Morning" or words to that affect, which most people can say in many foreign languages. It is submitted that the Government at least should have known the facts if the agents had been dealing with the Appellant, as they state, and if information was known to the Government that the Appellant did not speak English or broken English, then it was improper and bad faith for the Government to try to show to the jury that the Appellant was lying and that he could speak English, or at least broken English.

CONCLUSION

FOR THE REASONS STATED ABOVE AND IN
APPELLANT'S BRIEF-IN-CHIEF, THE
JUDGMENT OF CONVICTION SHOULD BE RE-
VERSED AND THE INDICTMENT DISMISSED,
OR ALTERNATIVELY, THE SENTENCE
SHOULD BE SUSPENDED.

Respectfully submitted,

LOUIS A. TIRELLI
Attorney for Defendant-Appellant
52 South Main Street
Spring Valley, New York 10977
(914) 352-4247

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS A. MENA,

Appellant.

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF ROCKLAND)

AFFIDAVIT OF MAILING
DEFENDANT-APPELLANT'S
REPLY BRIEF

KAREN GOULD, being duly sworn, deposes and says:

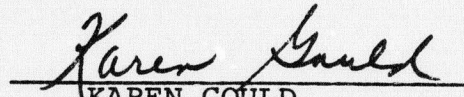
1. That I am not a party to the above action and am over the age of 18 years.

2. That I reside at 47 Madison Avenue, Garnerville, New York 10923.

3. That on January 31, 1978, I served three copies of the annexed Defendant-Appellant's Reply Brief for Defendant-Appellant in the following manner.

4. That I mailed the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below.

STEVEN G. NELSON, ESQ.
Assistant U.S. Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201


KAREN GOULD

Sworn to before me this
31st day of January, 1978.


NOTARY PUBLIC

LOUIS A. TIRELLI
NOTARY PUBLIC, State of New York
Reg. No. 3080430
Residing in Rockland County
My Commission Expires March 30, 1979